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April 20, 1992

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Ms. Donna R. Searcy, Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

APR 20 1992

EX PARTE

Re: ET Docket No. 92-9

Federal Communications Commission
Office of the Secretary

Dear Ms. Searcy:

Pursuant to Section 1.1206(a)(1) of the Commission's Rules, this is to notify you that today the Utilities Telecommunications Council (UTC) submitted the attached "Reply to Comments of American Personal Communications" regarding a UTC "Petition for Rulemaking.

The focus of the filing is that the action requested in the UTC petition is beyond the scope of ET Docket 92-9, and as such should be addressed in a separate Commission proceeding. The filing does, however, urge the Commission to take action that is related to ET Docket 92-9. UTC therefore requests that a copy of this letter and the attached "Reply Comments" be included in the public record for ET Docket No. 92-9.

Should any questions arise concerning this notification, please communicate with the undersigned.

Cordially yours,



Sean A. Stokes
Staff Attorney

Enclosure
cc: Public Inspection File

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Ex Parte in ET Docket 92-9

In the Matter of)
)
Amendment of Parts 2, 21 and 94)
of the Commission's Rules to)
Accommodate Private)
Microwave Systems in the 1.71 -)
1.85 GHz Band and in Bands Above)
3 GHz)

RM-_____

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APR 20 1992

To: The Commission

Federal Communications Commission
Office of the Secretary

REPLY TO COMMENTS OF AMERICAN PERSONAL COMMUNICATIONS

Pursuant to Section 1.405(b) of the Commission's Rules, the Utilities Telecommunications Council (UTC) hereby submits these reply comments in response to the Comments of American Personal Communications (APC) on the Petition for Rule Making (Petition) of UTC to amend Parts 2, 21 and 94 of the Commission's Rules to provide for use of frequencies in the 1.71-1.85, 3.7-4.2, 5.925-6.425, and 10.7-11.7 GHz bands by private microwave systems licensed under Part 94 of the Commission's Rules.^{1/}

As an initial matter, UTC notes the procedural irregularity of APC's Comments in response to UTC's Petition. Ordinarily, entities desiring to file comments either in support of or in

^{1/} The UTC Petition was filed with the Commission on March 31, 1992, and as yet has not been placed on official Public Notice by the FCC. The Comments of APC in response to the UTC Petition were filed with the Commission on April 13, 1992.

opposition to a petition for rulemaking are expected to wait until after the Commission places the petition on Public Notice. Otherwise, as discussed below, all members of the public are not afforded an equal opportunity to participate in the disposition of the petition.

The primary thrust of UTC's petition is that the Commission's Notice of Proposed Rulemaking (NPRM) to establish a "spectrum reserve" in the 1.85-2.20 GHz (2 GHz) microwave band does not adequately address the need for suitable replacement spectrum with appropriate technical characteristics to be in place and available for all displaced 2 GHz microwave users. Accordingly, the petition requests commencement of a rulemaking proceeding to specifically address technical and coordination rules which would have to be amended to make additional spectrum available for: (1) existing 2 GHz systems that would be displaced by new, emerging technologies, (2) new or modified systems that would have been licensed in the 2 GHz band but for the FCC's new, secondary-only, licensing policies for the 2 GHz band, and (3) new systems that might not be accommodated in other private microwave bands due to the migration of currently-licensed 2 GHz private and common carrier microwave systems.

In its Comments, APC argues against the need for a separate rulemaking to accommodate displaced 2 GHz microwave users, based on its belief that little relocation of incumbent microwave users

will be necessary to accommodate the introduction of personal communications services (PCS) in the 1.85-1.99 GHz band.^{2/} APC's Comments tout at some length the benefits of its particular PCS system and its purported ability to share spectrum with existing 2 GHz microwave systems, and therefore dismiss UTC's concerns as being a "vast overstatement."^{3/}

In discussing the merits of its PCS system and PCS in general, APC appears to misunderstand the underlying purpose of ET Docket 92-9. The purpose of this docket is to create a "spectrum reserve" for emerging technologies. The particular services or technologies that could be introduced into the spectrum reserve are largely irrelevant in this proceeding. Indeed, the NPRM in ET Docket 92-9 specifically contemplates the initiation of separate proceedings, including a separate proceeding on PCS, to determine the actual technologies that will receive allocations from the spectrum reserve.^{4/}

Moreover, APC's comments are limited to the impact of its proposed PCS system on microwave users licensed in the 1.85-1.99 GHz portion of the 2 GHz band. Thus, APC completely ignores the impact that the Commission's spectrum reserve proposal will have

^{2/} See Comments of APC, at p. 4.

^{3/} Id., at p. 5.

^{4/} NPRM in ET Docket 92-9, at paras. 28-29.

on the nearly 20,000 private and common carrier microwave systems licensed in the 2.11-2.15, and 2.16-2.20 GHz bands. It is wholly inappropriate, inaccurate, and inefficient, to attempt to determine the need and adequacy of available replacement spectrum based on anything less than the entire range of spectrum to be reallocated, particularly in light of the fact that microwave systems licensed on the upper portions of the 2 GHz band do not have the same operational and technical requirements as systems licensed in the lower portion of the band. Finally, arguments that the allocation may take place in phases and therefore might not force all portions of the 2 GHz band to relocate immediately ignore the fact that the NPRM proposes to make all new 2 GHz systems secondary regardless of where in the band these new systems are licensed.

Therefore, as UTC's petition asserts, with approximately 29,000 private and common carrier stations licensed in the 2 GHz band and potentially affected by the FCC's spectrum reserve proposal, it is incumbent upon the Commission to develop specific technical rules to accommodate both the technical, as well as the legal eligibility, requirements of all existing users of the 2 GHz band, and to provide spectrum for new private microwave systems.

APC suggests that the Commission should characterize UTC's petition as early-filed comments in ET Docket 92-9 and promptly

issue a public notice requesting interested parties to comment on UTC's proposals when comments are filed in that proceeding. Thus, APC implicitly acknowledges the merit of UTC's petition and need for interested parties to comment on the issues that UTC has raised.

However, APC's suggestion would not comport with the requirements of the Administrative Procedure Act (APA). As adopted, the NPRM in ET Docket 92-9 does not propose to change any of the technical rules or coordination procedures for any of the bands proposed to be "made available" for displaced 2 GHz microwave systems, nor does it even request comment on or suggestions for changes in the technical rules. Further, UTC's petition for rulemaking goes beyond the need to accommodate existing users of the 2 GHz band and addresses the need for additional microwave spectrum to be made available for future microwave systems. Thus, it would be beyond the scope of the NPRM in ET Docket 92-9 for the Commission to develop technical standards or coordination procedures for the fixed microwave services in that docket. The mere issuance of a public notice requesting comment on UTC's proposals would not remedy this defect.

As UTC pointed out in its petition, an agency's notice must provide sufficient detail and rationale for the rule to permit interested parties to comment meaningfully. Fertilizer Institute

v. EPA, 935 F.2d 1303, 1311 (D.C. Cir. 1991) citing Florida Power & Light Co. v. US, 846 F.2d 765 (D.C. Cir. 1988), cert. denied 490 U.S. 1045 (1989). A final rule will be deemed to be the logical outgrowth of a proposed rule if a new round of comments would not provide commenters with their first occasion to offer new and different criticisms which the agency might find convincing. Id. Notice of proposed rulemaking must be clear and to the point. McLouth Steel Products Corporation v. EPA, 838 F.2d 1317, 1323 (D.C. Cir. 1988). Moreover, while interested parties might file comments in Docket 92-9 on the technical compatibility problems with conducting private microwave operations in the common carrier microwave bands, the Commission could not bootstrap notice from any comments it receives so as to establish new technical or coordination standards for these microwave bands. See American Federation of Labor v. Donovan, 757 F.2d 330, 338 (D.C. Cir. 1985). Finally, general notice of proposed rulemakings must be published in the Federal Register. 5 U.S.C. § 553(b). Issuance of an informational public notice would not satisfy the APA's notice requirements.

In order to meet the requirements of the APA and to afford all interested parties adequate notice and opportunity to consider and comment on UTC's proposals, the Commission should promptly initiate a separate rulemaking proceeding to specifically address the technical requirements of displaced 2 GHz licensees, and to make appropriate changes in its Rules to

accommodate these systems as well as new systems. However, as UTC suggested in its petition, an acceptable alternative to the commencement of a separate rulemaking would be for the Commission to adopt a Further Notice of Proposed Rulemaking in ET Docket 92-9, and request interested parties to file unified comments on both the original NPRM and the Further Notice.

Conclusion

Under the FCC's NPRM in Docket 92-9 the Commission does not propose to consider the impact of a particular technology on a particular portion of the 2 GHz band, but instead proposes to reallocate a major portion of the band as a "reserve" for new technologies. APC's comments on the feasibility of co-primary sharing are relevant only in the context of a specific allocation proposal, and, until the specific services are identified and interference criteria adopted, it will be impossible to predict how many existing facilities in the 2 GHz band would be required to relocate.

The issues raised in the UTC petition are beyond the scope of the NPRM in ET Docket 92-9. The mere issuance of a public notice soliciting comments on UTC's proposals as part of the general comments in ET Docket 92-9 will not satisfy the requirements of the APA or provide adequate notice to interested parties. The Commission should initiate a separate rulemaking to

make the 1.71-1.85 GHz, 3.7-4.2 GHz, 5.925-6.425 GHz, and 10.7-11.7 GHz bands available for routine licensing in the Private Operational Fixed Microwave Service under Part 94, and to set appropriate technical standards and channeling plans to make these bands usable in private microwave systems.

WHEREFORE, THE PREMISES CONSIDERED, the Utilities Telecommunications Council respectfully requests the Commission to take action consistent with the views expressed herein.

Respectfully submitted,

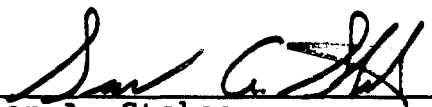
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April 20, 1992

CERTIFICATE OF SERVICE

I, Nancy Thompson, a secretary with the Utilities Telecommunications Council, hereby certify that a copy of the foregoing pleading was hand delivered, this 20th day of April, 1992, to each of the following:

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